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No. 01-518

IN THE
Supreme Court of the United States
OCTOBER TERM, 2001

BE&K CONSTRUCTION CO.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES AND ASSOCIATED BUILDERS AND CONTRACTORS, INC. IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INTRODUCTION

Pursuant to Supreme Court Rule 37.2(a), the Chamber of Commerce of the United States and the Associated Builders and Contractors, Inc. submit this joint brief as *amici curiae* in support of the Petitioner. All parties have given written consent to the filing of this Brief.[1]

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[1]Letters of consent have been filed with the Clerk of Court. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that this brief was not prepared, written or produced by any person or entity other than the *amici curiae* or its counsel.

INTEREST OF *AMICI CURIAE*

The *amici curiae* Chamber of Commerce of the United States (the "Chamber") and Associated Builders and Contractors, Inc. ("ABC") are, respectively, a federation of businesses and a trade association. They are filing this brief because of their mutual concern that the Decisions of the National Labor Relations Board (the "Board") and the Court of Appeals conflict with prior holdings of this Court on an issue of great importance: the First Amendment protection attaching to lawsuits filed by employers against labor organizations. The individual *amici* and their specific individual interests in this case are set forth below.

The Chamber is the world's largest federation of business companies and associations, with an underlying membership of nearly 3,000,000 businesses and professional organizations of every size, in every industry sector, and every region of the country. An important function of the Chamber is to represent the interests of its members by filing briefs *amicus curiae* in cases involving issues of concern to American business.

ABC is an association of more than 23,000 construction contractors and related firms. ABC members are regularly confronted by activities of labor organizations and their agents intent on removing them from both bidding on and performing private and governmental construction projects. Its members have a fundamental business interest in their business reputations and in protecting their businesses from competitors' anti-competitive activities.

The *amici* jointly believe that the legal issues under review herein are extremely important to employers

throughout the nation. The Board's decision here in *B.E.&K Construction Co.*, 329 N.L.R.B. No. 68 (1999), *enf'd*, 246 F.3d 619 (6th Cir. 2001), imposes a burden on employers under the National Labor Relations Act (the "Act") that emasculates employer rights preserved under the Act and under the First Amendment right to Petition the Courts for redress of grievances.

The Chamber's and ABC's participation as *amici curiae* will assist the Court in obtaining full consideration of the public-interest issues.

ISSUES

The *amici* hereby adopt and incorporate by reference the Petitioner's Questions Presented.

STATEMENT OF THE CASE

The *amici* hereby adopt and incorporate by reference the Petitioner's Statement of the Case.

The *amici* wish to stress that the Petitioner in this case filed suit against the unions only after its business had been attacked in a series of frivolous legal actions by the labor organizations. Even then, the Petitioner did not bring its antitrust claims until after consulting with numerous legal experts who advised that the claims had merit and should be pursued. In short, it is undisputed that BE&K filed its suit based upon a good faith belief that its claims had merit, and there has been no finding by the NLRB or the Circuit Court that BE&K's were "objectively baseless."

It must also be noted that BE&K did not file any litigation against its own employees or against employees of any other employer. BE&K solely took legal action against labor organizations who themselves had initiated legal proceedings against BE&K and its customer in the first instance. There is no dispute that the unions did not represent BE&K's employees and did not act on their behalf at any point in the proceedings.

SUMMARY OF ARGUMENT

The Petition presents a circuit court conflict concerning an issue of great public importance: whether the First Amendment will any longer protect the right of employers to petition the courts against non-employee labor organizations. The decisions of the NLRB and the Sixth Circuit, by misapplying the Court's holding in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), threaten to chill the business community's right of access to the courts due to the unavoidable risk of committing unfair labor practices under the newly announced standard.

The Board and court of appeals have improperly departed from the uniform standard established by the Court in *Professional Real Estate Investors, Inc. v. Columbia Pictures Ind., Inc.*, 508 U.S. 49, 51 (1993), under which the First Amendment protects all, but "objectively baseless" litigation. That departure conflicts with decisions in the Second, Third, Fifth, and Ninth Circuits.

As demonstrated in the Petition, the Board has abandoned the practice of evaluating the *bona fides* of an

employer's lawsuit upon objective considerations at the time the suit is filed, by erecting a rule that every lawsuit lost is an unfair labor practice. This Court's approach in *Professional Real Estate Investors, Inc.*, established "that litigation cannot be deprived of immunity as a sham unless the litigation is objectively baseless." 508 U.S. at 51.

Employers filing suit under the Board's "prevailing" test, as employed against the Petitioner in this case, will be unable to determine whether or not litigation is permissible under the Act. If BE&K's suit is unlawful, though filed and maintained with the support of expert advice and in defense of plainly improper non-employee conduct, then every employer lawsuit against a labor organization is a potential unfair labor practice.

The chilling effect of the Board and circuit decisions is compounded by their conflict with this Court's holding in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992), where the Court established that important distinctions exist between employees and labor organizations: "§ 7 simply does not protect nonemployee union organizers." BE&K here did not sue its own employees. Rather, it treated the non-certified, non-employee labor organizations in the same manner it would treat unlawful action of a competitor damaging its business.

Moreover, the Board's new policy departs from instructions given the Board by this Court in *NLRB v. Food Store Empl., Local 347*, 417 U.S. 1 (1974), where the Board's *Tiidee Products, Inc.*, 194 N.L.R.B. 1234 (1972), case was considered and the Board on remand determined that unless "patently frivolous defenses" are

asserted or the employer's defenses "are debatable," then attorneys' fees should not be awarded. *Heck's, Inc.*, 215 N.L.R.B. No. 142 (1974). Certainly, they should not be awarded where the employer's underlying action has been filed under Section 303 of the LMRA. *Summit Valley Industries, Inc. v. United Brotherhood of Carpenters & Joiners*, 456 U.S. 717 (1982).

Absent review by this Court, the amici are greatly concerned that the balance of labor relations will be undermined by the decisions below, as non-employee labor organizations are free to attack legitimate businesses, while those employers who believe in good faith that they have valid claims against union misconduct are nevertheless afraid to petition the courts in their own defense.

For these reasons, the Petition should be granted.

REASONS FOR GRANTING THE PETITION

I.
ABSENT REVIEW BY THIS COURT, THE DECISIONS BELOW THREATEN TO CHILL FUNDAMENTAL EMPLOYER RIGHTS OF ACCESS TO THE COURTS DUE TO CONFLICTING STANDARDS USED TO DETERMINE WHETHER BUSINESS LAWSUITS ARE "MERITORIOUS."

In 1983, this Court fashioned a balancing test to determine when the National Labor Relations Board ("Board") may enjoin a private state court lawsuit

because the suit itself constitutes the commission of an unfair labor practice and when the Board might find an unsuccessful lawsuit to be retaliatory in violation of the Labor Act. *See Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). At the same time, the Court affirmatively established, however, that "an employer has the right to seek local judicial protection from tortious conduct during a labor dispute." *Id.* at 742.[2]

In the decisions below, *amici* assert that the Board and the Court of Appeals distorted the intent and purpose of the Court's deliberate restrictions on the Board's jurisdiction to condemn lawsuits to be retaliatory unfair labor practices under the Act. In doing so, they have set up an almost impossible regime for employers to follow to protect their business interests.

That regime, simply stated, finds employer lawsuits against labor organizations to be unfair labor practices if the employer does not "prevail," regardless of the employer's good faith in filing suit and regardless of the objective "merit" of the litigation. This is an unwarranted expansion of the holding in *Bill Johnson's Restaurants* that completely disregards this Court's extension of First Amendment protection to all but "sham" litigation, in the cases of *Professional Real Estate*

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[2]In *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), the court had held that the state tort of libel was not preempted by the Labor Act. Neither are secondary boycotts or Sherman antitrust claims preempted by the Labor Act. See *Summit Valley Industries, Inc. v. United Brotherhood of Carpenters & Joiners*, 456 U.S. 17 (1982); *Mine Workers v. Pennington*, 381 U.S. 657, 669 (1965).

Investors, Inc. v. Columbia Pictures Ind., Inc., 508 U.S. 49 (1993), and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

By establishing a regime that discounts employers' First Amendment rights, the Board and the Court of Appeals threatened the entire business community's right of access to the courts to challenge potentially unlawful activity conducted by labor organizations. No employer can tell in advance of litigation whether a suit against a union will or will not be found to be an unfair labor practice.

Under the Board's standard, the only way to avoid an unfair labor practice finding is not to file suit, no matter how valid the employer believes its claim to be. This newly formulated Board caselaw adversely burdens and chills all employers' First Amendment rights to petition the government for redress of grievances. The *amici* urge the Court to grant Certiorari in order to prevent this chilling effect and to re-establish a single, uniform "sham" litigation standard.

Uniform standards under the First Amendment assure predictability and certainty to all litigants. As this Court affirmed in *Bill Johnson's Restaurants*, "weighty countervailing considerations...militate against allowing the Board to condemn the filing of a suit as an unfair labor practice and to enjoin its prosecution." 461 U.S. at 731. These considerations include "the right of access" to the state courts to seek redress of grievances, the preservation of domestic peace, and the substantial state interest in protecting the health and well-being of its

citizens. *Id.* at 742. *Three Affiliated Tribes v. Wold Engineering, P.C.*, 476 U.S. 877, 888 (1986).

Furthermore, the Court observed in *Bill Johnson's Restaurants* that the right of access to the courts was recognized to "stand apart" from other forms of action because it is a protected "aspect of the First Amendment right to petition the Government for redress of grievances." 461 U.S. at 741. That right, the Court explained "is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right." *Id* (emphasis added). Of course, here, the record shows that BE&K has not sought to enjoin any of its employees from exercising any right they may have.

This Court also showed in *Bill Johnson's Restaurants* that the proper manner for the Board to obtain jurisdiction after the state court case had concluded, required it to demonstrate that the state case was both improperly motivated and lacked a reasonable basis in fact or law. It explained the lack of reasonable basis in the First Amendment context to occur "when litigation is based on intentional falsehoods or on knowingly false claims." *Bill Johnson's Restaurants*, 461 U.S. at 743. This is itself the "sham" exception previously outlined from the Court's decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), which the Court explained in *Professional Real Estate Investors*, 508 U.S. at 57, that in *California Motor Transport Co.* "we extended *Noerr* to 'the approach of citizens...to administrative agencies...and to courts.'"

In *California Motor Transport*, this Court recognized that the First Amendment guarantee of a right to petition the government for a redress of grievances includes the right of access to the courts: "The right of access to the courts is indeed but one aspect of the right of petition." *Also McDonald v. Smith*, 472 U.S. 479, 482 (1985) ("The right to petition is cut from the same cloth as the other guarantees of [the First] Amendment...."). In *Professional Real Estate Investors*, this Court reaffirmed the "sham" litigation standard ten years after *Bill Johnson's Restaurants*, without any indication that *Bill Johnson's Restaurants* was intended to create an anomalous labor law exception to the otherwise uniform application of the First Amendment established by the Court.

Yet, in the cases now before the Court, the Board and the Court of Appeals, relying on unclear dicta from *Bill Johnson's Restaurants*, have ignored Petitioner BE&K's good faith belief in the merit of its lawsuit and ruled against BE&K without any finding that the suit was "objectively baseless." Indeed, the record shows that BE&K consulted with numerous antitrust experts prior to filing its claims, and those experts advised that BE&K's case against the unions had merit.[3]

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[3]The Court in *Professional Real Estate Investors*, viewed its test as similar to considerations undertaken in a tort for malicious prosecution. 508 U.S. at 63. It also believed that what the underlying court thinks of the lawsuit was important, especially "in light of the unsettled condition of the law, Columbia plainly had probable cause to sue....or at the very least...an objectively 'good faith argument for the extension, modification, or reversal of (continued...)

The lawsuit was therefore not a "knee-jerk" reaction to alleged Section 7 rights the labor organizations possessed. The rulings below create an unwarranted anomalous labor exception to access to the courts, one where the First Amendment protections are now nonexistent for non-prevailing plaintiffs.

Amici submit, however, that it is simply not enough for the Board to undertake an "academic" review of the record to reach self-fulfilling conclusions of law in order to condemn as an unfair labor practice any act to petition the government for redress of grievances. When that same government, through the federal judiciary, denies relief to a litigant, efforts undertaken by another federal arm of the government—such as the Board here—to punish plaintiff for bringing the case must be denied unless the litigation is shown to be objectively baseless. For any government functionary to punish a citizen/petitioner for exercising a fundamental constitutional right must be subject to the highest level of scrutiny, not the lowest.

Thirty years ago this Court in *Linn* provided labor organizations with fair warning that they were to be treated as functional entities who were not privileged to engage in reckless actions free from legal sanction: "[a]fter all, *the labor movement* has grown up and *must assume ordinary responsibilities*." *Linn*, 383 U.S. at 63 (emphasis added).

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[3](...continued)
existing law'" under Fed R. Civ. Proc. 11. *Id.* at 65.

It is paradoxical to attempt to hold labor unions subject to "ordinary responsibilities" and to continue to grant them immunity and privileges when their actions might facially amount to tortious activity. The failure to consider the importance of First Amendment access in the context of whether intentional falsehoods or knowingly frivolous administrative claims were asserted, as occurred here, is underscored by the Court's quotation in *Bill Johnson's Restaurants* from Balmer, *Sham Litigation and the Antitrust Laws*, 29 Buffalo L.Rev. 39, 60 (1980), to support the proposition that the same balancing approach taken by this Court under the antitrust laws should be followed under the Labor Act.[4]

Importantly, the *Bill Johnson's Restaurant* Court ruled that "[w]e should follow a similar course under the NLRA." 461 U.S. at 744.

The District of Columbia Circuit has recognized this conflict and called upon this Court to "one day create a uniform standard for sham litigation governing both NLRA and non-NLRA cases (or explain why the First

[4]The Ninth Circuit recently so observed in *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000), a case raised by Petitioner BE&K, where HUD sought similar fees as a statutory remedy against homeowners filing a state court lawsuit to prevent issuance of a use permit for homeless housing. The court found that the claim would "conflict with our prior case law which protects the First Amendment right of citizens to engage in petitioning activity, including the filing of lawsuits with an objective basis in fact or law, even if they ultimately prove unsuccessful." *Id.* at 1236. There is no reason supplied by the Sixth Circuit why uniformity should not apply to all federal agency enforcement statutes.

Amendment protects erring litigants less in the NLRA context than others)." *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 32 (D.C. Cir. 2001). That day has now arrived.[5]

However unclear the Court's language in *Bill Johnson's Restaurants* may have been in identifying "suits based on insubstantial claims" not entitled to protection, 461 U.S. at 731, the Sixth Circuit's position clearly sets itself against this Court's explanation in *Real Estate Investors, Inc. v. Columbia Pictures Ind., Inc.*, 508 U.S. 49 (1993).

In *Professional Real Estate Investors*, the Court resolved that the "sham" exception turns on the objective intent of the filer and included *Bill Johnson's Restaurants* in its legal overview of how the "sham" exception applies in "other contexts." 508 U.S. at 58. That case defined a two-part analysis where "[f]irst, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id* at 60. If so, then the reviewing court could examine the subjective motivation of the litigant focused on whether

[5]The facts of the present petition stand in stark contrast to the litigation found to be "frivolous" by the D.C. Circuit in *Petrochem Insulation, Inc.*, 240 F. 3d at 31. Whereas in *Petrochem*, the employer "failed to identify a single meritless objection to any construction project" made by the unions against it, BE&K identified fourteen meritless legal actions taken against it by the unions in the USS-POSCO litigation. *See USS POSCO v. Contra Costa County Bldg. & Constr. Trades Council*, 31 F. 3d 800, 804 (9th Cir. 1994).

the baseless lawsuit attempts to directly interfere with the opponent's business. *Id.*

Specifically, the Court viewed its line of decisions as demonstrating that "[w]e regard as sham 'private action that is not genuinely aimed at procuring favorable government action' as opposed to 'a valid effort to influence government action.'" 508 U.S. at 58. It also demonstrated the force of its ruling by stating that "we have repeatedly reaffirmed that evidence of anti-competitive intent or purpose alone cannot transform otherwise legitimate activity into a sham." *Id.* At 59.

The Sixth Circuit's rejection of the "sham" principle also places it in conflict with the decisions of the Ninth Circuit in *USS Posco v. Contra Costa County Bldg. & Constr. Trades Council*, 31 F.3d 800, 804 (9th Cir. 1994), stating that this Court in *Bill Johnson's Restaurant* was "applying *Noerr-Pennington* to [the] labor context;" the Third Circuit in *San Filippo v. Bongiovanni*, 30 F.3d 424, 429 (3d Cir. 1994), where "the unprotected status of 'sham litigation;'" was recognized "in construing the NLRA in the present context;" and the Fifth Circuit in *Brown & Root, Inc. v. Louisiana State AFL-CIO*, 10 F.3d 316, 325 (5th Cir. 1994), where that Court stated that in *Bill Johnson's Restaurants*, this "Court proceeded to input the sham exception to the *Noerr-Pennington* doctrine into labor law."[6] Unlike the decision in *BE&K v. NLRB* here, these three circuits did apply the *Professional Real Estate*

[6]*Eastern R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Mine Workers v. Pennington*, 381 U.S. 657, 669 (1965).

Investors "baseless" test, *i.e.*, no realistic chance of success on the merits, to their individual situations.[7]

As the Third Circuit observed in *Chauffeur, Teamsters, Local 776 v. NLRB*, 973 F.2d 230, 235 (3d Cir. 1992), the right of access to the courts is a "more significant consideration" than the potential that a lawsuit may be a powerful instrument of coercion. The Sixth Circuit's analysis unwinds the Court's *Bill Johnson's Restaurants* national standard and directly conflicts with the Court's fundamental conclusion that the use of a lawsuit for coercive purposes *is proper* so long as the lawsuit is *not baseless*.

This structure is also consistent with *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62 (2d Cir. 1992). There, the Second Circuit held the Board to the *Bill Johnson's Restaurants* requirement to identify disputed issues of fact or law and rejected the Board's automatic finding of lack of reasonable basis from an unsuccessful verdict (a settlement) in favor of the employer: "We think the better reading, however, requires the Board to find that the withdrawn suit lacked a reasonable basis in fact or law." *See Summitville Tiles, Inc.*, 300 N.L.R.B. 64, 65 (1990) (Board previously recognized "both essential prerequisites to enjoin prosecution of a state court lawsuit"; company conceded retaliatory motive).

[7]*Also Martin v. Gingerbread House, Inc.*, 977 F.2d 1405, 1407 (10th Cir. 1992), identified the "baseless test" in *Bill Johnson's Restaurants* to exist where "controlling federal law bars the plaintiff's right to relief, ... clear state law makes the case frivolous, or ... no reasonable jury could [find] in favor of the plaintiff." 461 U.S. at 754-55 (Brennan, J., concurring).

Further, intrusion by the Board in second guessing federal court litigation results requires review. Because the federal courts retain the inherent power to monitor and reprimand parties before them under Fed. R. Civ. Proc. 11 and 28 U.S.C. § 1927, if the court has jurisdiction of statutory violations of Section 8(b)(4) of the Act under 29 U.S.C. § 187, its refusal to impose sanctions with due respect for the employer's constitutional rights, must not be relooked at by the Board as it construes the same statute.

II.
REVIEW SHOULD ALSO BE GRANTED IN ORDER TO RESOLVE THE CIRCUIT CONFLICT WHICH NOW EXISTS REGARDING THE BOARD'S POWER TO AWARD ATTORNEYS' FEES TO NON-EMPLOYEE LABOR ORGANIZATIONS.

The chilling effect of the Board's decision in the present case is compounded by the fact that the Board has expanded the scope of *Bill Johnson's Restaurants* beyond its intended employee beneficiaries. The Sixth Circuit has endorsed the Labor Board's exercise of authority to award costs and attorneys' fees to uncertified non-employee labor organizations and has done so in a summary manner without fair consideration of the employer's non-retaliatory motives. The holdings of the Board and the Court of Appeals are wrong and must be reversed to prevent considerable harm to the balance of interests in labor relations throughout the country.

The Sixth Circuit's order conflicts with the Ninth Circuit's reasoning in *Diamond Walnut Growers, Inc. v.*

NLRB, 53 F.3d 1085 (9th Cir. 1995), and with the Sixth Circuit's own views expressed previously in *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 244 (6th Cir. 1995). Overriding each of these decisions is this Court's plain holding in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) ("§ 7 simply does not protect nonemployee union organizers.").

In *Diamond Walnut* the employer had sued a union that represented its striking employees along with another union that actually issued an allegedly defamatory letter. 53 F.3d at 1089. Similarly, in *Gibson Greeting v. NLRB*, 53 F.3d 385 (D.C. Cir. 1993), the Court denied a certified union's cross-petition alleging that the Board had erred by failing to award it attorneys' fees and costs under its winning § 8(a)(5) charge, for expenses incurred where the employer did not prevail in a section 301, 29 U.S.C. § 185, lawsuit filed for breach of the collective bargaining agreement. In *Gibson Greeting*, the Board did not consider "whether the employer's claims were made in bad faith." 53 F.3d at 394. The Sixth Circuit's expansive ruling is not supported by these two cases.

The traditional test for an attorneys' fee award under Board law was set forth in *Tiidee Products, Inc.*, 194 N.L.R.B. 1234 (1972), *enf'd mod. International Union of Electrical Workers v. NLRB*, 502 F.2d 349 (D.C. Cir. 1974), *cert. denied*, 417 U.S. 921 (1974). In *Tiidee Products*, a company was ordered to pay litigation costs associated with the NLRB proceeding due to the company's "clear and flagrant violation of the law" to discourage "future frivolous litigation." *Id.* *See also Lang Towing, Inc.*, 201 N.L.R.B. No. 92 (1973) (setting

forth a "frivolous" defense standard); *Heck's, Inc.*, 215 N.L.R.B. No. 142 (1974) (affirming frivolous defense standard).

In *Bill Johnson's Restaurants*, 461 U.S. at 747 (emphasis added), this Court set forth the following attorneys' fees standard:

> The employer's [civil] suit having proved unmeritorious, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the *employee's* Section 7 rights. If a violation is found, the Board may order the employer to reimburse the *employees* whom he had wrongfully sued for their attorneys' fees and other expenses. (Emphasis added).

Thus, the Court based its civil lawsuit/attorney's fee grant of authority on an anticipated finding of "employer retaliation" against its own employees, including but not limited to whether the civil suit had merit. The Court concluded "it is an enjoinable unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by § 7 of the NLRA." 461 U.S. at 744 (emphasis added).

Notably, in *Bill Johnson's Restaurants*, the employer did not sue any union, but instead sued eight of its own employees.[8]

In ordering BE&K to pay the union's fees and costs here, the Board ruled that the order is appropriate even though the lawsuit included causes of action which were not preempted and which might have constituted a reasonable basis for a damage suit before the Federal district court under Section 303 of the Act. This holding directly conflicts with this Court's decision in *Summit Valley Industries, Inc. v. United Brotherhood of Carpenters & Joiners*, 456 U.S. 17 (1982) (prohibiting an award of attorneys fees for filing a non-prevailing suit against a union under Section 303 of the LMRA).

The Sixth Circuit expressed an unfounded concern over creating an anomaly in the law by permitting suits against unions which would not have been permissible if undertaken against employee union members. The appeals court's resulting holding departs from the law enacted by Congress (and so interpreted by this Court), which plainly

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[8]The key ingredient in *Bill Johnson's Restaurants* was the defendant employees' status. This theme is repeated throughout the Court's opinion: "Since 1978, the Board has consistently adhered to the *Power Systems*[, 239 N.L.R.B. 445 (1978), *enf. denied*, 601 F.2d 936 (7th Cir. 1979),] rule that an employer or union who sues an *employee* for retaliatory motive is guilty of a violation of the Act," *id* at 739; "by suing an *employee* who files charges with the Board...the employer can place its employees on notice," *id*. at 740, and "[w]here, as here, such a suit is filed against hourly-wage waitresses or other *individuals who lack the backing of a union*, the need to allow the Board to intervene and provide a remedy is at its greatest," *id*. at 741.

defines labor organizations separately from employees. The *amici* are concerned that the Board's and Circuit Court's holding threatens to undermine the long accepted distinction between non-employee unions and their employees. "By its plain terms, . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers." *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992)."

That the Board's holding constitutes a revolutionary expansion of *Bill Johnson's Restaurants* can be seen in earlier rulings of the Board itself. Thus, in *Montgomery Ward Co.*, 288 N.L.R.B. 126, 195 (1988), the Board upheld an ALJ recommendation not to award attorneys' fees as a remedy to a stranger union that was not the employee bargaining representative, as follows:

> [T]he cases where the Board has awarded litigation expenses for civil or criminal court proceedings resulting from an employer's unlawful conduct, such awards have been uniformly given to employees. None of the cases involve non-employee union representatives. [citations omitted]. In light of the above I find no compelling basis for extending recovery of legal expenses for the criminal action or to direct the Respondent to request expurgation of the court's records on behalf of non-employee Johnson. (Emphasis added).

The Board has not ruled that BE&K's lawsuit was patently frivolous or its defenses not debatable, two requirements this Court adopted when it considered a Board reimbursement remedy case utilizing *Tiidee*

Products. *NLRB v. Food Store Empl., Local 347*, 417 U.S. 1, 9-10 & n.9 (1974). In *Tiidee*, the remedy there would have been considered "extraordinary," while here, it appears to have become simply part of a "conventional make-whole remedy."[9]

On remand from this Court's decision in *Food Store Empl., Local 347*, the Board clarified its policy and made it clear that costs and fees are limited to cases where "patently frivolous defenses" are asserted and are not recoverable where the defenses "are debatable," which includes situations that are "dependent on resolutions of credibility." *Heck's, Inc.*, 215 N.L.R.B. No. 142 (1974). Until the recent series of cases outlined here, this procedure remained the Board's unwavering standard. *Unbelievable, Inc.*, 318 N.L.R.B. 857, 860-61 (1995).

These standards derived from *Tiidee Products* have been uniformly applied in sustaining fee awards "only where the defenses asserted by the employer...are totally without merit or frivolous." *East Bay Chevrolet v. NLRB*, 659 F.2d 1006, 1011 (9th Cir. 1981); *J.P. Stevens & Co. v. NLRB*, 612 F.2d 881, 883 (4th Cir. 1980) ("only for frivolous or dilatory conduct"); *Dist. 65, Distributive Workers v. NLRB*, 683 F.2d 1155, 1167 (D.C. Cir. 1978) (affirming the *Heck's* frivolous standard); *United Steelworkers of Amer. v. NLRB*, 496 F.2d 1342, 1352-53 (5th Cir. 1974) (make whole remedy

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[9]In *Shepard v. NLRB*, 459 U.S. 344, 350 (1983), a wrongful dues cases, the Court affirmed the Board's order that the reimbursement remedy is to be "reserved for especially egregious cases." The decision below does not explain the reason for the dichotomy of treatment in the Board's decisions.

not available where "factually debatable questions," exist, the conduct was not for delay of collective bargaining, or frivolous); *Federal Prescription Service, Inc. v. NLRB*, 496 F.2d 813, 819 (8th Cir. 1974) (frivolous). The case at bar represents a dramatic departure from this standard without explanation.

The Board's remedial powers should not be applied to award attorneys' fees in cases involving non-employee actions filed with "debatable support." *Id.* *See Unbelievable, Inc.*, 318 N.L.R.B. at 860. For a lawsuit "proven to be without merit, [] does not mean that the suit was ipso facto an unfair labor practice." *IBEW, Local 532 (Brink Constr. Co.)*, 291 N.L.R.B. 437, 438 (1988).

In situations that should have required the Board to use a disciplined approach to determining retaliatory intent, the Board has not been circumspect at all in awarding fees. For example, in *American Pacific Concrete Pipe*, 292 N.L.R.B. 1264 (1989), it awarded fees against an employer's breach of contract and fraud suit where the union breached a private settlement agreement with it and pursued further remedies with the Board.

In *Federal Security, Inc.*, 336 N.L.R.B. No. 52 (2001), the Board issued a *Bill Johnson's Restaurant* remedy against the employer when it sought to recover damages for malicious prosecution and libel stemming from employee activity found *not* to be concerted activity by the Seventh Circuit in *NLRB v. Federal Security, Inc.*, 154 F.3d 751 (7th Cir. 1998). In *Heisler Food Enter., Ltd.*, Case No. 2-CA-30899, 1999 NLRB LEXIS 889

(1999), an ALJ ordered dismissal of the employer's libel and slander lawsuit against the union for publicizing through letters and flyers that its Jewish bakery was violating Kosher rules by contaminating dairy products with meat and other goods. Because the ALJ found the union's conduct protected activity, "it was by definition retaliatory within the meaning of *Bill Johnson*...." 1999 NLRB LEXIS at *82.

In *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 244 (6th Cir. 1995), the court plainly refused to enforce an attorney's fee award in favor of non-employee union organizers. Relying upon this Court's decision in *Bill Johnson's Restaurants* and *Tiidee Products* it found the "harsh remedy of a grant of attorneys' fees" should not be awarded to non-employee unions.

In addition, under *Tiidee Products*, BE&K's defense of the single unfair labor practice charge stemming from its filing of a secondary boycott and an antitrust count in federal court cannot be deemed "frivolous," in "clear flagrant violation of the law," *id.*, pre-empted or an illegal act. *Local 32B-32J, Service Employees Int'l Union*, 68 F.3d 490, 496 (D.C. Cir. 1995) (interpreting *Bill Johnson's Restaurants* as allowing the Board to award fees "if the litigation was unlawful").[10]

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[10]In *Teamsters Local 776 (Rite Aid Corp.)*, 305 N.L.R.B. 832 (1991), the Board explained, that "[t]he 'retaliatory motive' refers to *actual motive* of the respondent-plaintiff in filing the suit." *Id.* at 834. This requires "an improper motivation, a subjective criterion." *Teamsters, Local 776 v. NLRB*, 973 F.2d 230, 236 (3d Cir. 1992). Here, the Board did not explain this criterion in

(continued...)

It has become clear that the Board's cases show it has completely lost the ability to distinguish between cases against labor organizations and employees and in situations where Section 7 activity is and is not involved for purposes of issuing a remedial order. In every case, the Board finds a judicial loss is equivalent to lack of merit and therefore a violation of Section 8(a)(1) of the Act.

In *Bill Johnson's*, this Court was asked to protect relatively defenseless employees from retaliatory, nonmeritorious employer lawsuits. The present decision, however, shifts the entire balance of American labor relations by threatening employers with unfair labor practice findings merely for defending their businesses against well funded "corporate campaign" activities by large labor organizations, much of which is occurring outside the confines of the NLRA. BE&K's petition should be granted so that the Court can resolve the serious and important conflicts created in the law by the holdings of the NLRB and the Court of Appeals.

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[10](...continued)
BE&K's situation.

CONCLUSION

For these reasons, and for each of the reasons set forth in greater detail in BE&K's Petition, *amici curiae* respectfully request that a writ of *certiorari* issue to review the judgment of the court of appeals.

Respectfully submitted,

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